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No. 286

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

SOUTHEASTERN AVIATION, INC.,
d/b/a SOUTHEAST AIRLINES,
Appellant,

vs.

A. H. HURD, Individually and as Administrator of the Estate of Phyllis Eloise Hurd Halstead, Deceased,
Appellee.

On Appeal from the Supreme Court of Tennessee.

MOTION TO DISMISS APPEAL WITH BRIEF IN SUPPORT THEREOF.

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Appellee.

On Appeal from the Supreme Court of Tennessee.

MOTION TO DISMISS APPEAL

The Appellee respectfully moves the Court to dismiss the appeal herein upon the following grounds:

1. This appeal is not within the jurisdiction of this Court because not taken in conformity to statute.

2. This appeal does not present a substantial federal question.

3. The federal question as to the constitutionality of Sections 42-106 and 42-107 of Tennessee Code Annotated

sought to be reviewed, was not timely or properly raised, and was not expressly passed on.

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Appellee.

On Appeal from the Supreme Court of Tennessee.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL.

JURISDICTION.

On March 8, 1962, a final judgment was entered by the Supreme Court of Tennessee against the appellant and in favor of the appellee for damages for the wrongful death of appellee's intestate who was killed in an airplane crash that occurred in Tennessee on January 8, 1959. On and

prior to the date of this crash, appellant was an intrastate air carrier, with its operations confined to the State of Tennessee. The aforesaid judgment of the Supreme Court of Tennessee is based upon a finding that appellant was guilty of negligence under the common law of Tennessee which proximately caused the wrongful death of appellee's intestate who was a fare paying passenger on one of appellant's intrastate flights.

Appellant has appealed to this Court, and asserts, in its Jurisdictional Statement, that the jurisdiction of this Court to review this judgment of the Tennessee Supreme Court "by direct appeal is conferred by Title 28, U.S.C. § 1257 (2)". (See Jurisdictional Statement, page 3).

Title 28 U.S.C. § 1257 (2) provides as follows:

> "Final judgments or decrees rendered by the highest Court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Appellant apparently predicates its right to appeal to this Court on the ground that the Tennessee Supreme Court held that Sections 42-106 and 42-107 of Tennessee Code Annotated were valid under the Federal Constitution, (See Jurisdictional Statement, page 12; and Appendix, page 28a). These two sections of the Tennessee Code are the only Tennessee statutes referred to by appellant.

No reference is made in the opinion of the Supreme Court of Tennessee or in the judgment based thereon to Sections 42-106 and 42-107 of Tennessee Code Annotated. These Tennessee statutes were not relied on by the appellee

in support of this action, and were never specifically referred to by the parties or the Tennessee Courts. It is clear, we submit, from the opinion of the Supreme Court of Tennessee, (Appendix to Jurisdictional Statement, Page 4a-8a), that the federal constitutionality of these two Tennessee statutes has never been drawn in question and has not been passed upon by that court.

Since the federal constitutionality of these two statutes of Tennessee was never "drawn in question" or passed upon in the state courts of Tennessee, we respectfully submit that this Court lacks jurisdiction of this appeal under 28 U.S.C. § 1257 (2).

Appellee's contention that this Court lacks jurisdiction under 28 U.S.C. § 1257 (2) of cases in which the federal constitutionality of a state statute was never "drawn in question" or passed upon in the state courts is supported by the following cases:

Anonymous v. Baker, 360 US 287, 3 L ed 2d 1234, 79 S Ct 1157; and **Rohr Aircraft Corp. v. County of San Diego,** 362 US 628, 4 L ed 1002, 80 S Ct 1050.

QUESTIONS PRESENTED.

Appellee respectfully submits that the following is a statement of the only question presented by this appeal:

HAS THE FEDERAL AVIATION ACT OF 1958 OCCUPIED THE AVIATION FIELD SO COMPLETELY THAT, BY IMPLICATION, THE STATE COURTS ARE EXCLUDED FROM ENTERTAINING ACTIONS TO RECOVER DAMAGES FOR THE WRONGFUL DEATH OF A PASSENGER KILLED IN AN AIRPLANE CRASH PROXIMATELY CAUSED BY AN INTRASTATE AIR CARRIER'S NEGLIGENCE AS DETERMINED BY THE COMMON LAW OF THE STATE IN WHICH THE TORT OCCURRED?

STATEMENT.

Appellee desires to correct certain omissions in the Statement made by Appellant in its Jurisdictional Statement.

Appellant asserts that "—the Supreme Court of Tennessee held that the Federal Aviation Act of 1958 did not pre-empt the field—" and "—that the general scheme of regulation of the air space and the operation of aircraft therein as set forth in the Federal Aviation Act has left room for each state to provide rules, regulations and standards which will govern within the respective states the operation of aircraft, provided the state rules and regulations are not inconsistent with the purpose of the Federal Act." (See Jurisdictional Statement, pp.11-12).

We cannot agree with this statement by appellant. The Supreme Court of Tennessee expressly held that the purpose of the Federal Aviation Act was to take control of the air space of the United States, and also to provide for the establishment of rules, regulations and minimum standards to promote the efficiency and safety of air navigation. (See Opinion of Supreme Court of Tennessee, Appendix to Jurisdictional Statement, page 5a).

Appellant's jurisdictional Statement (pp. 10-11) also contains only a partial quotation of the Tennessee Supreme Court's opinion dealing with the question of whether or not the Federal Aviation Act of 1958 pre-empted the field so that state courts have no jurisdiction to try wrongful death actions growing out of airplane crashes. Appellant's quotation fails to show the omission of some six paragraphs of the Court's opinion between the first sentence and the remaining sentences of the last quoted paragraph of the Tennessee Supreme Court Opinion as set forth on page 11 of appellant's Jurisdictional Statement. The omitted por-

tions of the Tennessee Supreme Court's Opinion begin with the second sentence of the following quotation:

"It seems clear this Act does not exclude state law not inconsistent with its purpose. Its language above quoted (sec. 1508 (a) is the same as that of the Civil Aeronautics Act of 1938, 49 U.S.C.A., section 176 (a), which was held not to exclude consistent state law—a law of Nebraska taxing aircraft used interstate in landing on and departing from airports within that state. Braniff Airways v. Nebraska State Board, 347 U.S. 590, 98 L. Ed. 970.

"There, the Court said that 'these Federal Acts (the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938) are bottomed on the commerce power of Congress, not on national ownership of the navigable airspace, as distinguished from sovereignty', and that federal power over navigable airspace, like federal power over navigable streams, 'does not prevent state action consistent with that power.' To the same effect: Huron Portland Cement Co. v. Detroit (1960), 362 U.S. 440, 4 L. Ed. 2d 852.

"The conclusion that the Federal Aviation Act of 1958 does not exclude consistent state law, or alter existing remedies under state law, seems to be strengthened by the words of the savings clause of that Act (U.S.C.A., sec. 1506), which are as follows: 'Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.'

"The Court of Appeals put its decision upon this savings clause, citing Erie R. Co. v. Tompkins, 82 L. Ed. 1188, 304 U.S. 64, 114 A.L.R. 1487, to the effect that 'there is no federal general common law', and holding

that this saving of 'the remedies now existing at common law or by statute' refers to the common law and statutes of the several states. Learned counsel for petitioner insists that this reference is not to state law, but to federal law. We think this argument is unsound. Porter v. Southeastern Aviation, Inc. (1961), 191 Fed. Supp. 42, 43.

"The language of this savings clause, above quoted, is the same as that of the Interstate Commerce Act (49 U.S.C.A., sec. 22), which has been held to refer to the remedies under the common law and statutes of the several states and to preserve their 'general and concurrent jurisdiction' in suits for damages against an interstate carrier. Pennsylvania R. Co. v. Puritan Coal Mining Co., 237 U.S. 121, 130, 59 L. Ed. 867, 872; Pennsylvania R. Co. v. Sonman S.C. Co., 242 U.S. 120, 61 L. Ed. 188; Central New England Ry. Co. v. Boston & Albany R. Corp., 279 U.S. 415, 420, 73 L. Ed. 770, 775.

"The Federal Aviation Act of 1958 appears to be merely an administrative measure, limited to the regulation of the operation of aircraft in the interest of public safety. It does not touch the traditional area of the law of torts or private right, and does not give any remedy for an injury to such right, such as an injury to the person of a passenger caused by an air carrier's negligence in the operation of its plane.

"Petitioner likens this Act to the Labor Management Relations Act which pre-empts the field and excludes state law in labor disputes. But since the latter affords no remedy for recovery of damages caused by a tort, state courts have jurisdiction in such a case to award damages according to 'its traditional low of torts.' United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656, 98 L. Ed. 1025; Int. Union, U.A.A. & A.I.W. v. Russell, 356 U.S. 634, 2 L. Ed. 2d 1030; cf. San

Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 243-244, 3 L. Ed. 2d 775, 782, with Charles Dowd Box Co., Inc. v. John F. Courtney et al (Feb. 19, 1962), U.S. L. Ed. 2d ."

The Supreme Court of Tennessee, after referring to the fact that appellee's declaration "charged common law negligence", and was "a suit in tort upon a right created by the law of the state", (See appellant's Appendix, page 7a), also said:

"Nor did it (appellee's declaration) lose its character as an action for negligence under state law because it also averred a violation of regulations of the Civil Aeronautics Board. Such averment merely added another ground of negligence for recovery; it did not raise an issue of federal law or invoke a federal right which would be supported if such law were given one construction or effect and defeated if given another. Dennis v. Southeastern Aviation, Inc., 176 Fed. Supp. 542, 543; Pan American P. Corp. v. Superior Court, U.S. , 6 L. Ed. 2d 584, 589-591, and cases there cited.

"It was for this reason that this case was held not removable, not being a case under Constitution or the laws of the United States, or of diversity of citizenship. The same conclusion was reached by the United States District Courts in two other similar cases growing out of the same accident. Dennis v. Southeastern Aviation, Inc., supra, 176 Fed. Supp. 542; Porter v. Southeastern Aviation, Inc., supra, 191 Fed. Supp. 42."

The Supreme Court of Tennessee (see appellant's Appendix, page 19a) also held:

"A common carrier of passengers for hire is not an insurer of their safety, but owes them a duty of the highest degree of care consistent with the practical

operation of the plane. The carrier must exercise such care not only in respect of the operation, but also of the equipment and maintenance of the plane. 6 Am. Jur., Aviation, section 51; Knoxville Cab Co. v. Miller, 176 Tenn. 88, 138 S.W. 2d 428. We find nothing to the contrary of this common law rule in the Federal Aviation Act of 1958. That Act recognizes that a duty rests upon air carriers 'to perform their services with the highest possible degree of safety' (49 U.S.C.A. sec. 1421)."

We also respectfully disagree with appellant's contention that "there is a direct conflict between the laws of Tennessee, upheld as constitutional and applied by the Supreme Court of Tennessee, and the rules and regulations of the Federal Aviation Agency here involved" (Jurisdictional Statement, page 13). Appellant then refers to the civil air regulations (14CFR 40.232 (b); Appendix, p. 54a), permitting as a minimum standard of safety the use of only one automatic direction finder (ADF).

The Federal Aviation Act of 1958 expressly provides that the civil air regulations issued by the Administrator thereunder are "minimum standards" only. 49 USC § 1421 (a).

Furthermore, the civil air regulations require the use of two ADFs under certain circumstances. Section 40.406-2(c), page 35 of Civil Aeronautics Manual 40, (Part of Exhibit 17) permits the use of certain ground navigational facilities **"provided the aircraft is equipped with dual automatic direction finder receiver—"** (Emphasis supplied).

Also, under the evidence introduced in this case and as found by the Tennessee Supreme Court, appellant's illfated plane "had only one ADF, and it was not working—" (Opinion of Tennessee Supreme Court, Appendix, p. 18a). This was in direct violation of the civil air regulations relied on by appellant.

ARGUMENT.

Assuming for purposes of argument that this Court has jurisdiction of this appeal under 28 U.S.C. § 1257 (2), we nevertheless respectfully submit that the appeal should be dismissed for the reasons set forth in Grounds 2 and 3 of Appellee's motion to dismiss.

We also submit that if the appeal is treated as a petition for certiorari under 28 U.S.C. § 2103, then the petition for certiorari should be denied because:

(1) Appellant's contention that the doctrine of federal pre-emption precludes state courts from awarding damages according to "its traditional law of torts" in cases where the federal statute provides no remedy for tortious conduct has been settled to the contrary by this Court; and

(2) The Supreme Court of Tennessee has decided this federal question in a way which is in accord with the applicable decisions of this Court.

1. No Substantial Federal Question.

Appellee's action is based on common law negligence. It is an action founded on the "traditional law of torts".

The Federal Aviation Act of 1958 does not create any right of action for wrongful death caused by tortious conduct of an air carrier in the operation of its planes.

Appellee contends that it is settled law that the doctrine of federal pre-emption does not preclude state courts from awarding damages according to "its traditional law of torts" in cases where the federal statute provides no civil remedy for tortious conduct.

This contention of appellee is supported by the following cases:

United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656, 98 L. Ed. 1025; **Int. Union U.A.A. & A.I.W. v. Russell**, 356, U.S. 634, 2 L. Ed. 2d 1030; cf. **San Diego Bldg. Trades Council v. Garmon**, 359 U.S. 236, 243-244, 3 L. Ed. 2d 775, 782, with **Charles Dowd Box Co., Inc. v. John F. Courtney** et al. (Feb. 19, 1962), U.S. , 7 L. Ed. 2d 423; 82 S. Ct. .

See also **Richards v. United States**, (February 26, 1962), US , 7 L Ed 2d 492, 82 S Ct. , which involved wrongful death actions under the Federal Tort Claims Act for airplane passengers killed in a crash occurring in Missouri by reason of alleged acts of negligence occurring in Oklahoma, in which case this Court applied the whole law of the state where the acts of negligence took place, including such state's conflict of laws rules.

The Federal Tort Claims Act provides that the liability of the United States in such cases shall be "in accordance with the law of the place where the act or omission occurred." (28 USC § 1346 (b)).

We believe that this Court will take judicial notice of the large number of tort actions which have been filed against the United States under the Federal Tort Claims Act growing out of airplane crashes. These cases apply the law of the state where the act or omission occurred. (**Richards v. United States**, supra).

If appellant's contention were upheld, the result would be that tort actions between private individuals growing out of airplane crashes would be governed by federal common law while such actions against the United States would be governed by the appropriate state common law. Furthermore, such tort actions against the United States and a private defendant, as co-defendants, would produce the unusual result of applying federal common law to the

private defendant and the appropriate state common law to the United States.

Appellee, therefore, respectfully submits that this appeal should be dismissed because it does not present a substantial federal question.

If the appeal is treated as a petition for certiorari under 28 U.S.C. § 2103, it is submitted that there are no special or important reasons for granting the petition, and that, in the exercise of this Court's discretion, the petition should be denied.

In support of this contention, appellee relies on the facts and the authorities referred to above under the heading of "Jurisdiction", and also in this Section 1 of the Argument. For these reasons, we submit that the Supreme Court of Tennessee, on the question of pre-emption, followed the law as settled by prior decisions of this Court, or, that the state court's decision on this question was in accord with applicable decisions of this Court. **United Construction Workers vs Laburnum Construction Corporation,** supra.

2. **QUESTION OF FEDERAL CONSTITUTIONALITY OF TENNESSEE STATUTES NOT RAISED IN STATE COURTS.**

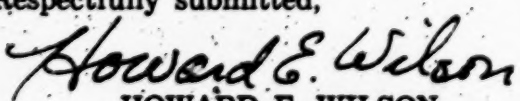
Appellee has pointed out above, in his statement under the heading of "Jurisdiction", that the two sections of the Tennessee Code Annotated, (T.C.A. 42-106 and 42-107) which appellant now contends violates the federal constitution, were not relied on by appellee and were not referred to by the Tennessee Courts. As shown by the opinion of the Tennessee Supreme Court (Appendix to Jurisdictional Statement, pp. 7a-8a), appellee's pleadings merely charged common law negligence and did not charge negligence based upon the alleged violation of any statute of Tennessee. Appellee merely alleged that appellant was guilty of negli-

gence by failing to exercise that degree of care required of carriers under the common law of Tennessee. The federal constitutionality of the two sections of the Tennessee Code Annotated was never drawn in question because appellee was relying on the Tennessee common law rule that the law of the place where a tort (both negligence and injury) is committed will govern the substantive rights of the parties.

CONCLUSION.

Appellee respectfully submits that appellant's appeal should be dismissed, and if the appeal is treated as a petition for certiorari, such petition should be denied.

Respectfully submitted,



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